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ADDITIONAL PROTOCOL ON CONSULAR FUNCTIONS TO THE VIENNA CONVENTION ON CONSULAR RELATIONS

Report of the Secretary-General

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I. INTRODUCTION

1. On 9 December 1991 the General Assembly adopted resolution 46/61 entitled "Additional protocol on consular functions to the Vienna Convention on Consular Relations", paragraphs 2 and 3 of which read as follows:

> "The General Assembly,
>
> "...
>
> "2. Invites Member States as well as other States parties to the Convention to submit their views on this question to the Secretary-General in accordance with paragraph 3 of resolution 45/47;
>
> "3. Requests the Secretary-General to submit to the General Assembly at its forty-seventh session a further report containing the replies received under paragraph 2 above".

2. Pursuant to the above request, by a note dated 19 February 1992, the Secretary-General invited the Governments of Member States as well as of other States parties to the Convention to submit the replies referred to in paragraph 3 of resolution 46/61.

3. The present report reproduces the replies that had been received as at 14 July 1992. Any further replies will be reproduced in addenda to the present report.

II. REPLIES RECEIVED FROM MEMBER STATES AND OTHER STATES PARTIES TO THE CONVENTION

AUSTRALIA
(also on behalf of Canada and New Zealand)

[Original: English]

[29 June 1992]

1. Australia appreciates the efforts of Austria and the Czech and Slovak Federal Republic to elaborate and supplement the provisions relating to consular functions contained in article 5 of the Vienna Convention on Consular Relations.

2. Article 5 of the Vienna Convention specifies 12 of the primary consular functions and provides in article 5 (m) that the sending State may also entrust to the consulate other functions not prohibited by the laws of, or not objected to by, the receiving State, or which are agreed to by the sending and receiving States.

3. Australia recognizes the lack of uniformity within the international community regarding the scope of consular functions exercised pursuant to

article 5, but notes that the perceived need for flexibility in the exercise of consular functions was the reason for the adoption of a non-inclusive definition of consular functions by the diplomatic conference concluding the Convention.

4. Australia considers that careful consideration should be given to the proposal to enumerate additional consular functions and to further elaborate existing functions. Such a course could both limit the scope of consular functions and detract from the discretion exercised by States in deciding which consular functions are to be performed.

5. Australia is of the view that this matter should be further considered and finally resolved at the forty-seventh session of the General Assembly.

CUBA

[Original: Spanish]

[18 June 1992]

1. The Government of Cuba wishes to reiterate the view it has already expressed: the Vienna Convention on Consular Relations of 1963 is a carefully drafted legal instrument, which remains valid and takes due account of matters relating to consular functions.

2. Article 5 of the aforesaid Convention correctly lists the 13 principal consular functions, thus allowing for a clear interpretation and facilitating the utilization and implementation of the document.

3. Furthermore the aforesaid instrument provides for the possibility of signing bilateral agreements, thereby allowing for expeditious handling of such functions by this means. This is graphically illustrated in connection with the amount of time the authorities of the receiving country have in which to notify the sending country of the arrest of one of its citizens, a matter that, owing to the differences concerning these periods that exist between the various national legislations, is easier to settle through the bilateral channel.

4. The protocol itself causes us the following concerns: article 3 of the protocol lists the notarial functions of consulates. In view of the fact that notarial functions differ from one country to another, it would be preferable to avoid placing limitations on these activities; for this reason the Government of Cuba finds the wording of article 5, paragraph (f), of the Convention of 1963 more acceptable. Moreover, the draft gives the receiving State the power to legalize documents of the sending State; this is not compatible with Cuban legislation.

5. Likewise, the dissimilar problems that arise in relation to nationality could become a source of conflict, given the possibility that the consulate

would have, under article 5 of the draft under discussion, to issue certificates of nationality.

6. The Government of Cuba considers that, on the whole, the Vienna Convention on Consular Relations correctly lists the functions that are set forth in article 6 of the additional protocol; in its view, the latter makes these functions unnecessarily broad. The Government of Cuba believes that the same is true regarding article 11 of the draft protocol with respect to the powers that were clearly stated in articles 5 (k) and (l) of the Convention.

7. With regard to article 15 of the draft, the Government of Cuba feels it is not proper to set a fixed deadline for the authorities of the receiving country to notify the official of the sending State concerning the aspects covered by that article, since these deadlines vary according to the national legislation of each country. In the view of the Government of Cuba, it would be better to keep the phrase "without delay" used in the Convention of 1963.

8. The Government of Cuba will be happy to participate in the informal consultations to be held during the forty-seventh session, and hopes that these preliminary views will be of some use in the context of the discussions.

GUATEMALA

[Original: Spanish]

[6 April 1992]

I. BACKGROUND

1. The exercise of consular functions is based on the Vienna Convention on Consular Relations of 24 April 1963. However, the sphere of consular functions has expanded owing to the increase in relations between States, prompting the latter to conclude bilateral agreements to regulate consular functions in greater detail, on the basis of article 73, paragraph 2, of the aforementioned Vienna Convention, which states: "Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof".

2. Taking the foregoing into account, the General Assembly, at its forty-fifth session, adopted resolution 45/47 of 28 November 1990, entitled "Additional protocol on consular functions to the Vienna Convention on Consular Relations", in which the Assembly agreed, among other things, to request the Secretary-General to seek the views of Member States and of other States Parties to the Vienna Convention on Consular Relations on the proposal by the Chargés d'affaires a.i. of the Permanent Missions of Austria and Czechoslovakia to the United Nations concerning the elaboration of an additional protocol on consular functions to the Vienna Convention and to submit a report thereon to the Assembly at its forty-sixth session.

3. Guatemala, which is a State Member of the United Nations and a Party to the Vienna Convention on Consular Relations, therefore wishes to express its views on the elaboration of an additional protocol to the Vienna Convention with a view to regulating consular functions.

II. CONSIDERATIONS

Analysis of the draft additional protocol on consular functions to the Vienna Convention on Consular Relations submitted to the forty-fifth session of the General Assembly in accordance with the request of the Chargés d'affaires a.i. of the Permanent Missions of Austria and Czechoslovakia to the United Nations

4. The draft additional protocol contains precise rules relating to consular functions, but the preamble to the draft states that questions not expressly dealt with would continue to be governed by rules of customary international law. In general, the draft deals with the following functions:

(a) Communication with nationals of the sending State;

(b) Issuance of passports, visas and travel documents;

(c) Acting as civil registrar;

(d) Acting as notary;

(e) Safeguarding the rights and interests of nationals of the sending State in cases of succession mortis causa, and of minors, other persons lacking full capacity, and absent persons;

(f) Representing nationals of the sending State before the tribunals and other authorities of the receiving State;

(g) Executing letters rogatory or commissions to take evidence;

(h) Exercising rights of supervision and inspection in respect of vessels and aircraft.

5. Article 1 states that the definitions listed in article 1, paragraph 1, of the Vienna Convention on Consular Relations shall be applied. It also states that the provisions relating to nationals of the sending State shall apply, mutatis mutandis, to legal persons and partnerships under commercial law which are established in accordance with the laws and regulations of the sending State or which have their head office in that State.

6. Article 2 refers to the consular functions of issuing passports and travel documents to nationals of the sending State and the issuance of visas to persons wishing to travel to the sending State, to leave it or to pass in transit through it.

7. Article 3 concerns the consular functions of acting as civil registrar and authenticating signatures and documents. However, the Spanish text of the draft protocol uses the expression "autorizar firmas o documentos", although it would be more advisable to use the expression "autenticar firmas o documentos".*

8. Article 4 deals with the consular function of acting as notary, which is very broad in scope, for the following reasons:

(a) All consular officers must be notaries and must moreover be fully familiar with the laws and regulations of the receiving State. Although these requirements are not expressly mentioned, they will be necessary for the exercise of the functions mentioned in this article.

(b) In the specific case of Guatemala as a receiving State, the consular functions involved in acting as notary conflict with its internal law (articles 28 and 29 of the Judicial Organization Act; and articles 2 and 5 and article 6, paragraph 2, of the Notarial Code).

9. It should be noted that the Guatemalan law relating to notarial consular functions follows a system that is more efficient and above all is compatible with the legal order of other States, as envisaged in article 4 of the Judicial Organization Act and article 6, paragraph 2, of the Notarial Code.

10. Article 5 refers to the consular function of accepting for safe keeping documents, cash, valuables and other articles belonging to nationals of the sending State. Paragraph 2 of the article states that the articles accepted for safe keeping for return to their owners, who are nationals of the sending State, may be exported from the receiving State only where such export is not contrary to the laws and regulations of that State; it should be added that the relevant tax laws must be complied with if such exports are subject to tax.

11. Article 6 refers to the consular functions of certification, translation, execution of letters rogatory or commissions to take evidence and provision of legal assistance.

12. Article 7 covers the consular function of protecting the rights and interests of minors or other persons requiring trusteeship, or of absent persons, who are nationals of the sending State.

13. Article 8 covers the case of the death of a national of the sending State in the receiving State.

14. Article 9 refers to the consular function of representing nationals of the sending State before the tribunals and other authorities of the receiving State.

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* Translator's note: The suggestion involves a drafting change in the Spanish text and does not affect the English text.

15. Articles 10 to 14 concern the consular functions relating to the exercise of rights of supervision and inspection in respect of vessels and aircraft; the following points should be noted in this regard:

(a) Articles 10 and 11 deal in greater detail and scope with the consular functions referred to in article 5, paragraphs (k) and (l), of the Vienna Convention.

(b) Article 12 provides that where an authority of the receiving State intends to take any coercive measures or institute an investigation on board a vessel or aircraft of the sending State, or if the master or a member of the crew of a vessel of the sending State is taken ashore, or if a comparable measure is taken with regard to the captain or a member of the crew of an aircraft of the sending State, the authorities of the receiving State shall so notify the consular officer before the measure is begun, in order that the consular officer may be present when the measure is carried out. This rule might be prejudicial to the receiving State, but it could be accepted, since the same article states that if, in urgent cases, the consular officer cannot be notified in advance, the authorities of the receiving State shall inform him of the measures which have been taken; furthermore, it states that the article shall not apply to customs, passport or sanitary inspection or to actions taken at the request or with the consent of the master of the vessel or the captain of the aircraft.

16. Article 15 refers to the consular functions exercised when the authorities of the receiving State deprive a national of the sending State of his personal freedom or restrict that freedom. The provisions of this article are compatible with the laws and regulations of Guatemala and amplify the provisions of article 36, paragraph 1 (b) and (c), of the Vienna Convention. Article 15 also provides that the consular officer may propose that criminal proceedings against a national of the sending State shall be conducted in that State. This provision is acceptable, since it involves a request and not an order; moreover, the article states that the proposal must be in accordance with the laws and regulations of the receiving State.

17. Article 16 states that the provisions of the additional protocol shall not affect other international agreements in force and that States parties may in the future conclude international agreements confirming or supplementing or extending or amplifying the provisions of the protocol.

18. Articles 17 to 22 contain the general rules relating to the signature and ratification of the additional protocol, accession to the protocol, the deposit of the relevant instruments and the date of entry into force of the protocol.

III. CONCLUSION

19. This Department takes a favourable view of the draft additional protocol on consular functions to the Vienna Convention on Consular Relations. Nevertheless, in accordance with the foregoing considerations, the following changes should be made.

IV. RECOMMENDATIONS

20. This Department considers that the following amendments should be made to the draft additional protocol on consular functions to the Vienna Convention on Consular Relations:

(a) First amendment*

Article 3, paragraph 1 (d), reads: "Autorizar documentos expedidos por autoridades competentes del Estado receptor ..."; we suggest that it should read: "Autenticar documentos expedidos por autoridades competentes del Estado receptor ...".

(b) Second amendment*

Article 3, paragraph 1 (e), reads: "Autorizar la firma de nacionales del Estado acreditante estampada en documentos, ..."; we suggest that it should read: "Autenticar la firma de nacionales del Estado acreditante estampada en documentos, ...".

(c) Third amendment*

Article 3, paragraph 1 (f), reads: "Autorizar la firma de nacionales del Estado receptor estampada en documentos ..."; we suggest that it should read: "Autenticar la firma de nacionales del Estado receptor estampada en documentos ...".

(d) Fourth amendment

Article 4 reads:

> "Consular officers shall also have the right to draw up or authenticate in notarial form in the receiving State the following legal acts and contracts provided that they are not contrary to the laws and regulations of the receiving State:

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* Translator's note: The first, second and third amendments suggest that in the Spanish text the word "autorizar" should be replaced by "autenticar"; no change is required in the English text.

"(a) Legal acts and contracts between nationals of the sending State, as well as unilateral legal acts of such persons, provided that such legal acts and contracts do not result in the establishment, alteration or abrogation of rights in respect of immovable property situated in the receiving State;

"(b) Testamentary dispositions of nationals of the sending State or other declarations relating to the estates of such nationals;

"(c) Legal acts or contracts relating exclusively to property situated in the sending State or to business being conducted in that State, irrespective of the nationality of the parties."

We suggest that article 4 should read as follows:

"In the receiving State, consular officers shall have the right to authenticate acts, contracts and instruments in accordance with the laws and regulations of the sending State, when:

(a) The consular officers are notaries recognized in the sending State; and

(b) The acts, contracts and instruments are to have effect in the sending State".

(e) Fifth amendment*

Article 5, paragraph 1 (b), reads: "Aceptar de las autoridades del Estado acreditante, a los efectos de devolverlos a sus propietarios, ...". It should read: "Aceptar de la autoridades del Estado receptor, a los efectos de devolverlos a sus proprietarios, ...".

(f) Sixth amendment

Article 5, paragraph 2, reads:

"The articles accepted for safekeeping in accordance with paragraph 1 may be exported from the receiving State only where such export is not contrary to the laws and regulations of that State."

We suggest that it should read:

"The articles accepted for safe keeping in accordance with paragraph 1 may be exported from the receiving State only where such

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* Translator's note: The fifth amendment corrects an error in the Spanish translation of the additional protocol - "Estado acreditante" is to be replaced by "Estado receptor": no change is required in the English text.

export is not contrary to the laws and regulations of that State and where, as appropriate, the relevant export tax laws are complied with".

(g) Seventh amendment*

Article 15, paragraph 1, reads: "A los efectos de llevar a la practica lo dispuesto en los apartados b) y c) del articulo 36 de la Convencion ..."; we suggest that it should read: "A los efectos de llevar a la practica lo dispuesto en los apartados b) y c) del parrafo 1 del articulo 36 de la Convencion ...".

PORTUGAL
(on behalf of the European Economic Community and its Member States)

[Original: English]

[30 June 1992]

1. The Twelve have taken note with interest of the proposal by the Federal Minister for Foreign Affairs of the Republic of Austria and the Minister for Foreign Affairs of the Czech and Slovak Federal Republic concerning the elaboration of an additional protocol on consular functions to the Vienna Convention on Consular Relations (A/45/141). The Twelve firmly believe that the Vienna Convention on Consular Relations contributes to friendly relations among nations and plays an essential role in creating favourable conditions for the activities of consular posts and for the conduct of consular relations. This Convention contains only one article on consular functions.

2. Article 5 lists 12 consular functions and declares in article 5 (m) that consular officers may also perform any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State. The proposed additional protocol seeks to develop and specify to a certain extent the functions listed in article 5 and to elaborate on the remainder referred to in article 5 (m).

3. Many States Parties to the Vienna Convention, including the Twelve, have also concluded a number of bilateral consular agreements that describe in more detail the functions listed in the Convention and sometimes also other functions. States that have a network of bilateral consular agreements might

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* Translator's note: The seventh amendment corrects an omission in the Spanish translation of the additional protocol by inserting "del parrafo 1": no change is required in the English text.

have no particular need for a new multilateral instrument on consular functions. However, the Twelve are well aware that not every State Party to the Vienna Convention has such a network of bilateral consular agreements, and that for this reason some States may see advantages in an additional protocol on consular functions. The advantages of uniformity would however have to be weighed against a possible limitation on the freedom to negotiate with other States on a bilateral basis, as was pointed out by the Permanent Representative of the Netherlands in his statement on behalf of the Twelve in the Sixth Committee on 20 November 1991.

4. With respect to the procedure to the followed in considering the item entitled "Additional protocol on consular functions to the Vienna Convention on Consular Relations" during the informal consultations at the forty-seventh session of the General Assembly, the Twelve submit that careful consideration of the advantages to be reaped by an additional protocol and of the possibilities of success in negotiating it is called for, taking into account also the problems of harmonization of domestic legislation. In this respect, the Twelve are of the opinion that the above consideration should be completed as soon as possible, in order to render possible the adoption of a final decision on the matter at the forty-seventh session of the General Assembly.

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PROTECTION OF THE ENVIRONMENT IN TIMES OF ARMED CONFLICT

Report of the Secretary-General

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* A/47/150.

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I. INTRODUCTION

1. On 9 December 1991, the General Assembly adopted decision 46/417 entitled "Exploitation of the environment as a weapon in times of armed conflict and the taking of practical measures to prevent such exploitation". In paragraph (b) of the decision the Assembly requested the Secretary-General to report to it at its forty-seventh session on activities undertaken in the framework of the International Red Cross with regard to that issue.

2. Pursuant to that request, the Secretary-General, by a letter dated 19 February 1992, invited the International Committee of the Red Cross (ICRC) to transmit to him for inclusion in the report the information requested in paragraph (b) of the decision.

3. The reply received from ICRC is reproduced below.

II. INFORMATION RECEIVED FROM THE INTERNATIONAL COMMITTEE OF THE RED CROSS

4. The international community has given the ICRC a mandate "to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof" (art. 5, para. 2 (g) of the Statutes of the International Red Cross and Red Crescent Movement), and ICRC has declared itself ready to undertake work aimed at protecting the natural environment in wartime. The present report has been drawn up in response to the request contained in paragraph (b) of General Assembly decision 46/417.

A. Report on existing law

1. Background

5. Since its inception, international humanitarian law has set limits on the right of belligerents to cause suffering and injury to people and to wreak destruction on objects, including objects belonging to the natural environment, and has traditionally been concerned with limiting the use of certain kinds of weapons or means of warfare which continue to do damage even after a war is over, or which may injure people or property of States which are completely uninvolved in the conflict.

6. The Declaration of St. Petersburg of 1868 expressed this idea in the following terms:

> "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy ...".

7. Article 35, paragraph 1, of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (see paras. 17-24 below) expresses this fundamental rule as follows:

> "In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited".

8. The concept of proportionality also sets important limits on warfare: the only acts of war permitted are those that are proportional to the lawful objective of a military operation and actually necessary to achieve that objective.

9. These fundamental rules are now part of customary international law, which is binding on the whole community of nations. They are also applicable to the protection of the environment against acts of warfare.

10. The rules of international humanitarian law have been drawn up to address the specific problems caused by warfare. As such, they are applicable as soon as an armed conflict breaks out.

11. In addition to the rules of law pertaining to warfare, general (peacetime) provisions on the protection of the environment may continue to be applicable. This holds true in particular for the relations between a belligerent State and third States.

12. The following paragraphs review the major international legal rules which are relevant to the protection of the environment in time of war.

2. The Hague Convention respecting the Laws and Customs of War on Land, of 18 October 1907, with the Regulations annexed thereto, and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949: the protection of property

13. Like international law in general, international humanitarian law has been slow in recognizing that the environment requires protection by a set of specific rules of law. Thus, the word "environment" does not appear in the Hague Regulations or in the 1949 Geneva Conventions, and none of those treaties addresses specific environmental issues. However, article 23 (g) of the Hague Regulations states that it is forbidden "to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war".

14. In the event of belligerent occupation, article 55 of the Hague Regulations and article 53 of the Fourth Geneva Convention set limits to the discretion of the Occupying Power as far as the destruction of property is concerned. Article 53 of the Fourth Geneva Convention states as follows:

"Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations is prohibited, except where such destruction is rendered absolutely necessary by military operations."

15. Thus, an Occupying Power that destroys, for example, industrial installations in an occupied territory and in so doing causes damage to the environment violates the Fourth Geneva Convention, if such destruction is not rendered "absolutely" necessary by military considerations. If such destruction is "extensive", the act becomes a grave breach of that same Convention (art. 147), i.e. a war crime.

16. The limits discussed in this section do not relate to environmental issues as such, but they do protect the environment by prohibiting the wilful or unjustified destruction of property.

3. Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I): the protection of the environment as such

17. Protocol I includes two provisions that deal directly with the dangers that modern warfare represents for the environment. They protect the environment as such, although they do so in relation to human beings, who are the principal concern of international humanitarian law. Those provisions are article 35, paragraph 3:

"It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment."

and article 55:

"1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

"2. Attacks against the natural environment by way of reprisals are prohibited."

18. Article 35 sets out the general rule applicable to all acts of warfare, whereas article 55 is intended to protect the civilian population from the effects of warfare on the environment. In both cases, the following are prohibited: (a) attacks on the environment as such, and (b) using the environment as an instrument of warfare.

19. Article 35, paragraph 3, and article 55 prohibit only such damage to the environment as is "widespread, long-term and severe", thereby making it clear that not all damage to the environment is outlawed. Indeed, damage to the environment is unavoidable in war. The point at issue, therefore, is where to set the threshold.

20. The question as to what constitutes "widespread, long-term and severe" damage and what is acceptable damage to the environment is open to interpretation. There are substantial grounds, including from the travaux préparatoires of Protocol I, for interpreting "long-term" to refer to decades rather than months. On the other hand, it is not easy to know in advance exactly what the scope and duration of some environmentally damaging acts will be; and there is a need to limit as far as possible environmental damage even in cases where it is not certain to meet a strict interpretation of the criteria of "widespread, long-term and severe". Because Protocol I, as at present interpreted, does not necessarily cover all cases of damage to the environment, the earlier rules, especially those of the Hague Convention of 1907 and the Geneva Convention of 1949, continue to be very important.

21. Besides article 35, paragraph 3, and article 55, other provisions of Protocol I touch incidentally on protection of the environment in armed conflict. In particular, article 56 deals with the danger to the environment resulting from the destruction of dams, dykes or nuclear electrical generating stations. Under the heading "Protection of objects indispensible to the survival of the civilian population", article 54 prohibits in certain circumstances the destruction of, among other things, agricultural areas or irrigation works. Articles 52 ("General protection of civilian objects") and 57 ("Precautions in attack") also have an important bearing on the protection of the environment.

22. Finally, article 36 obliges the parties to Protocol I to determine whether the acquisition, development or use of a new weapon would be compatible with international law. Of course, the rules on the protection of the environment are to be taken into account during this assessment.

23. In conclusion, the provisions of Protocol I usefully supplement earlier principles and rules of international humanitarian law and contain some important rules prohibiting a wide range of acts destructive of the environment in times of armed conflict.

24. At present, 113 States are parties to Protocol I. Its provisions on environmental protection are therefore binding international law for the majority of States, but not yet for all of them.

4. Other international instruments

25. A number of other international instruments have a direct bearing on the protection of the environment in time of war. The following treaties are worthy of mention:

(a) Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, of 17 June 1925;

(b) Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, of 10 April 1972;

(c) Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention), of 10 December 1976

This treaty, which was drafted under the auspices of the Committee on Disarmament and the United Nations, is intended to prohibit military or any other hostile use of "environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party" (art. 1). The Convention is thus primarily concerned with prohibiting the use of the forces of the environment as weapons. In so doing, of course, it inevitably outlaws damage to the environment resulting from the use of such methods of warfare;

(d) Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects, of 10 October 1980

This Convention was concluded under United Nations auspices and is intended, as its name implies, to prohibit or restrict the use of certain weapons. It has three annexed protocols dealing with: (a) non-detectable fragments, (b) mines, booby-traps and other devices, and (c) incendiary weapons. The second and third of these should make useful contributions to protecting the environment in times of armed conflict.

26. Furthermore, all international rules limiting the development, production, testing or use of weapons of mass destruction make a significant contribution to the protection of the environment in times of armed conflict. Special mention should be made of the draft Chemical Weapons Convention drawn up under the auspices of the Conference on Disarmament.

5. The special case of non-international armed conflict

27. The rules protecting the victims of non-international armed conflict are less well developed than those governing international armed conflict.

28. Article 3, common to the four Geneva Conventions of 1949, does not say anything about protecting the environment during civil wars; it addresses only humanitarian issues in the strictest sense.

29. The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) contains no provisions relating directly to the environment. However, article 14, on the protection of objects indispensible to the survival of the civilian population, has a direct impact on warfare and the environment, with its prohibition of attacks on agricultural areas, irrigation works, etc. The same applies to article 15, which protects "works and installations containing dangerous forces".

30. Other legal provisions regarding the environment, for example rules of general or bilateral international treaties, are likely to remain applicable to a State in which there is an internal conflict.

6. The question of implementation

31. The treaties of international humanitarian law provide various mechanisms - some of them very complex - for implementing their substantive provisions. Among these mechanisms we mention the following: (a) the system of Protecting Powers; (b) the International Fact-Finding Commission; (c) specific functions assigned to ICRC to interpret and monitor the implementation of international humanitarian law; (d) the obligation to "ensure respect for" that law; (e) the principle of individual penal responsibility; (f) the obligation of States to ensure that the provisions of the Geneva Conventions and their Additional Protocols are known as widely as possible. In addition, other international institutions and treaties bearing on environmental issues have their own monitoring and implementation mechanisms, which may be important in dealing with a wide range of cases of environmental damage.

(a) The system of Protecting Powers

32. Under the 1949 Conventions and their Additional Protocols, the role of Protecting Powers is to attend to the implementation of the provisions of those treaties and to safeguard the interests of the Parties to a conflict and of their nationals on enemy territory.

(b) International Fact-Finding Commission (Protocol I, article 90)

33. This Commission has the mandate, in the event of an alleged violation of international humanitarian law during an armed conflict, to ascertain the facts and to offer its services to the Parties concerned with a view to preventing further violations. Obviously, the Commission could render invaluable service should there be wartime damage to the environment in time of armed conflict. The Commission's competence depends on a special declaration of acceptance (art. 90, para. 2). Twenty-nine States have now made that declaration and the Commission was constituted in June 1991.

(c) Role of ICRC

34. ICRC is a neutral and independant humanitarian institution, the mission of which is to provide assistance and protection to the victims of armed conflict. The international community has given it a number of mandates that are precisely defined in the Geneva Conventions. The institution thus may find itself acting as a substitute for Protecting Powers. It also has a recognized right of initiative that assigns it a role in monitoring the implementation of international humanitarian law.

(d) Duties of all States parties to humanitarian treaties

35. Article 1, common to the four Geneva Conventions and to Protocol I, stipulates that the Contracting States are under an obligation "to ensure respect for" those treaties. This emphasizes the shared responsibility of all Parties to the Conventions and Protocol I to make sure that humanitarian obligations are met by each and every State, in particular by the States parties to an armed conflict. The duty to protect the natural environment in time of armed conflict is one of those obligations.

(e) Individual penal responsibility

36. The States parties to the Geneva Conventions of 1949 and the Additional Protocols are required to take all possible measures to ensure that their obligations are properly discharged in time of war. One of the most important of these measures is the adoption of provisions at the national level for penal sanctions. Article 147 of the Fourth Geneva Convention (and similar articles in the First and Second Geneva Conventions) establishes clearly that unjustified destruction of property is a war crime. Although causing widespread, long-term and severe damage to the environment is not, as such, a grave breach of Protocol I, it may be a grave breach of other provisions.

(f) Obligation to spread knowledge of the law

37. Each State party to the Geneva Conventions or to the Additional Protocols must ensure that the text of these treaties is disseminated as widely as possible throughout its territory in both peacetime and wartime. The States must, inter alia, incorporate study of the subject into their programmes of military and, if possible, civilian instruction.

B. Principal activities in recent years

38. Much important work was undertaken in the early 1970s in connection with protecting the environment in times of armed conflict. ICRC participated actively in this process, which led to the adoption of the main international rules governing this area, in particular, the "ENMOD" Convention, article 35, paragraph 3, and article 55 of Protocol I of 1977, and certain provisions of the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to

Have Indiscriminate Effects. In subsequent years, there was little discussion on the protection of the environment in time of armed conflict, although certain conflicts had caused serious environmental damage, due in particular to the large-scale and indiscriminate use of mines, the bombing and shelling of whole areas and attacks on oil-producing installations, resulting in severe pollution.

39. The need to protect the natural environment in time of armed conflict was brought home to the world suddenly and tragically during the Gulf conflict in 1990-1991. In the months that followed that conflict, ICRC took part in a number of meetings and symposia held to discuss whether existing law offered an adequate response to environmental disasters, in particular, the Conference on a Fifth Geneva Convention organized in June 1991 by Greenpeace International, the London School of Economics and the Centre for Defence Studies; the Conference of Experts on the Use of the Environment as a Tool of Conventional Warfare, organized by the Government of Canada at Ottawa in July 1991; the Consultations on the Law Concerning the Protection of the Environment in Times of Armed Conflict, convened by the International Union for Conservation of Nature and Natural Resources (now World Conservation Union) and the International Council of Environmental Law at Munich in December 1991.

40. This is not the place for a detailed discussion of those meetings (on which complete reports have been published). It is nevertheless necessary to briefly recall their main conclusions and the principal questions they defined. At those meetings, generally speaking, the idea of creating an entirely new body of international rules for the protection of the environment was ruled out. Most experts insisted on the importance of existing law, while acknowledging that there were a number of gaps in the rules currently applicable. The first step, therefore, was to ensure that even more States accede to or ratify existing treaties, that they observe their existing obligations and, at the same time, enact coordinate domestic legislation.

41. The content of this body of law has been discussed on many occasions. These discussions show that protection of the environment in time of armed conflict is not provided for only by specific existing rules on this subject (see sect. I) but that other international rules also make a contribution. These include certain fundamental principles of humanitarian law - whether treaty-based or customary - the rules of international environmental law and certain rules governing international responsibility.

42. Close attention was also paid to the implementation of existing law. Emphasis was laid on a number of means of encouraging proper implementation. Particular mention was made of dissemination, i.e. measures to make the law as widely known as possible, and the very useful role that could be played by the International Fact-Finding Commission, the recently constituted body provided for under article 90 of Protocol I.

43. It was felt that while a new body of codified law on the subject would not be justified, there was nevertheless a need to develop or clarify existing law to deal with certain issues, such as:

(a) Harmonization of the interpretation of the specific provisions of the "ENMOD" Convention and Protocol I;

(b) The simultaneous applicability of the rules of international environmental law and humanitarian law;

(c) Determining what body of law is applicable between a belligerent and States which are not party to the conflict but are nevertheless affected by means of warfare harmful to the natural environment;

(d) The need to do more to protect the natural environment as such and to find better ways of preventing damage to the environment in times of armed conflict.

44. The General Assembly also dealt with this question at its forty-sixth session, and adopted, on 9 December 1991, decision 46/417, pursuant to which the present report was prepared.

45. Finally, problems relating to environmental protection in times of armed conflict were also discussed at the United Nations Conference on Environment and Development. These discussions led to the adoption of several texts relating to protection of the environment in time of armed conflict. Among them, one should mention paragraph 39.6 (a) of Agenda 21 which states:

> "Measures in accordance with international law should be considered to address, in times of armed conflict, large-scale destruction of the environment that cannot be justified under international law. The General Assembly and the Sixth Committee are the appropriate forums to deal with this subject. The specific competence and role of the International Committee of the Red Cross should be taken into account."

C. Work carried out under the auspices of the International Committee of the Red Cross

46. To discharge the mandate assigned to it by the General Assembly in decision 46/417, ICRC convened a meeting of experts to study the problem of protecting the environment in times of armed conflict. The meeting, which was held at Geneva from 27 to 29 April 1992, brought together over 30 experts from the armed forces, the scientific community, academic circles and Governments, as well as representatives of governmental and non-governmental organizations. All were invited on a personal basis.

47. The goals of the meeting were as follows:

(a) To define the content of existing law;

(b) To identify the main problems involved in implementing this law;

(c) To identify any gaps in existing law;

(d) To determine what should now be done in this area.

48. The preparatory reports sparked initial general debates during which the participants examined whether or not the rules of international environmental law were applicable in times of armed conflict. Most concluded that they could be presumed to be applicable at least to a certain extent, in so far as they do not contain specific disclaimers, but that further research on this question was necessary.

49. The importance and relevance of the currently applicable rules (whether of treaty-based or customary international humanitarian law, environmental law or rules based on the principles of public international law governing international responsibility) were clearly reaffirmed, as was the need to make them more widely known, in particular by means of handbooks expressly drawn up for members of the armed forces.

50. The participants also concluded that there was a need to clarify certain aspects of applicable law and to look for ways of protecting the natural environment in time of non-international armed conflict.

51. Finally, there was large support for the proposal made by some among them to protect - subject to conditions that remain to be set - nature reserves which could be likened to demilitarized zones or other protected areas.

52. The participants then went on to draw up a list of the most important matters requiring study. There was not enough time to deal with everything on the list but conclusions were none the less reached on some of them. While these conclusions cannot be considered final, they are very useful. The following is a summary of the discussions that took place on specific issues on this list.

1. The notion of the global interest of the international community as a whole in the protection of the environment in the provisions of international humanitarian law

53. The experts concluded that there was a general interest - going well beyond that of the parties to the conflict themselves - in preserving the natural environment. Even in time of armed conflict, this general interest should be taken into account by the belligerents when selecting methods and means of warfare.

2. Balance between protection of the environment and military necessity (including the principle of proportionality): need for specific provisions or clarifications

54. In reply to this second question, the participants stressed the need to take environmental protection into account when assessing the military advantages to be expected from an operation. They reaffirmed the importance and relevance with regard to environmental protection of the accepted principles concerning the conduct of hostilities. These include:

(a) The prohibition of actions causing damage that is not warranted by military necessity;

(b) The obligation, when possible, to choose the least harmful means of reaching a military objective;

(c) The obligation to respect proportionality between the military advantage expected and the incidental damage to the environment.

3. Rules of customary international law (including those of Protocol I)

55. The importance of customary rules was recognized by all. Indeed, some participants even felt that these rules were the key to protecting the environment in time of armed conflict, as they prohibited attack on the environment as such. However, some expressed doubt about the customary nature of certain provisions of Protocol I of 1977.

4. Relationship between international humanitarian law and international environmental law (regional and universal regulations); possible similarity to the relationship between international humanitarian law and Human Rights Law:

(a) Between a State non-Party to the conflict and belligerents;

(b) Between belligerents

56. The relationship between international environmental law and humanitarian law was closely studied. Echoing what had been said during the general debate, experts expressed the opinion that the instruments of international environmental law remained or should remain largely applicable in periods of armed conflict. There was a need, they felt, for each of the main treaties of environmental law to be studied with this in mind. They also recommended that whenever feasible any new treaty adopted in this area should contain a provision specifically stipulating that it was applicable in times of armed conflict. The participants went on to remark that there was a certain analogy

between the implementation in times of conflict of human rights law and of environmental law. They thus accepted that the applicability of certain provisions of environmental law could be suspended in times of conflict, but that the most important among them (comparable to the "hard core" provisions of human rights law) must be complied with in all circumstances.

5. Role of the Martens clause in the protection of the environment

57. The Martens clause states that in cases not covered by the specific provisions, civilians and combatants remain under the protection and authority of the principles of international law derived from established customs, from the principles of humanity and from the dictates of public conscience. The experts recognized that this clause could indeed make a very useful contribution to protecting the environment in times of armed conflict.

6. Interpretation and relations of the rules of Protocol I and the ENMOD Convention

58. The participants recalled the respective raisons d'être of those provisions of Protocol I and the 1976 ENMOD Convention. Some felt the need to ensure that the terms employed in these two treaties would be interpreted in the same way. However, neither the legal nor the procedural means of accomplishing this task have yet been found.

59. Other considerations dealt with in a preliminary fashion included:

(a) Acceptability of self-inflicted damages to the environment; scorched earth policy and use of the environment by States for their own protection and on their own territory;

(b) Protection of the environment in sea warfare. Influence of the general law at sea;

(c) When should damages to the environment be qualified as "grave breaches"? State responsibility and compensation;

(d) Applicability of the principle of precaution to the protection of the environment in time of armed conflict;

(e) Influence of the protection of the environment in the interpretation and in the drafting of legal instruments limiting or prohibiting the use of specific weapons; influence in the development of new weapons;

(f) Protection of the environment in time of non-international armed conflict: content and scope of applicable law; difference with the provisions applicable in international armed conflict;

(g) Means to ameliorate the implementation of the rules on the protection of the environment: "Green Cross"; "Green helmets"; role of ICRC; protected areas; dissemination, instruction and military manuals; possible role of the International Fact-Finding Commission; mechanisms for the settlement of disputes, further means.

60. Finally, the experts encouraged ICRC to carry on its work to clarify and, where necessary, develop the rules to protect the natural environment in times of armed conflict.

D. The position of the International Committee of the Red Cross

61. The International Committee of the Red Cross agrees to a great extent with the initial conclusions reached in the various meetings of experts organized in recent months. It has reservations about proposals to undertake a new process of codification of the rules protecting the environment in times of armed conflict. For one thing, ICRC feels that the result would be of dubious value and could even be counter-productive. Moreover, the institution believes that if several aspects of the existing law were elaborated on and if that law were more fully implemented, it would provide adequate protection of the environment in times of armed conflict.

62. ICRC therefore wishes to see a particular effort made to increase compliance with existing rules and to improve their implementation. This naturally requires the greatest possible number of States to become party to the treaties now in force and to use the specific means of implementation provided for by the instruments of international humanitarian law.

63. Though it is convinced that faithful implementation of existing law should go a very long way to limiting environmental damage in times of conflict, ICRC is quite aware that this law is in need of interpretation, clarification and development. Thus, the meaning of certain terms should be agreed on and made to conform between different treaties, and a number of specific issues (such as the applicability in times of conflict of rules of environmental law essentially intended for peacetime and the content of the law applicable to non-international armed conflicts) should be studied more closely.

64. ICRC is also very much in favour of proposals to do more to protect natural reserves in times of conflict. Likewise, it feels that careful attention should be paid to the problem of environmental damage caused by the indiscriminate and unrecorded laying of mines.

65. Finally, the use on the battlefield of certain specific weapons represents, in ICRC's view, a growing risk to the natural environment. The law of armed conflict must therefore take these technical developments into account and keept their effects within tolerable limits. It should be stated

very plainly that many methods and means of warfare available today will, if used, inevitably harm the environment. Though means should obviously be found to provide a degree of protection for the environment, this should in no way be allowed to relieve those concerned of the duty to settle disputes peacefully.

E. Conclusions

66. Recent deliberations have clearly demonstrated the need to continue looking for ways of protecting the natural environment in times of armed conflict and have made it possible to identify a number of very important problems to which realistic and effective solutions must quickly be found. The only way of doing this is to call on experts from a range of different fields to help.

67. Since its foundation as a neutral and impartial institution, ICRC has played a central role in developing and interpreting the rules of international humanitarian law, and many of the provisions of that law currently in force originated in such work carried out under its auspices.

68. ICRC is thus willing to contribute actively to the search for adequate means of protecting the environment in times of armed conflict by providing the international community with solutions to current problems in this area. It has already decided to continue its consultation of experts in order to study a number of specific and still unresolved matters and to set up a programme of further activities. In particular, ICRC is ready to work in the preparation of a handbook of model guidelines for military manuals.

69. The deliberations of the forty-sixth session of the General Assembly proved the importance of this issue. They also demonstrated the need to clarify a number of questions. ICRC is prepared to make a contribution to this process of clarifying and interpreting existing rules with the help of the most competent experts in the field.

70. ICRC believes that its activities will help States to take the well-informed political decisions required to protect the natural environment in times of armed conflict.